SUPREME COURT, U. S.
DEC 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-873

JACK HALPERIN,

Petitioner

V.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR STAY

CHARLES W. TESSMER
706 Main Street, Suite 400
Dallas, Texas 75202

ATTORNEY FOR PETITION HALPERIN

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IN THE

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OCTOBER TERM, 1973

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JACK HALPERIN,

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UNITED STATES OF AMERICA

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TO THE HONORABLE LEWIS F. POWELL, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Petitioner, JACK HALPERIN, having this day filed a petition for writ of certiorari, a copy of which is appended hereto (Exhibit A), moves the Court for an order staying enforcement of the judgment herein pending final disposition of this case by the Court.

In support of this application, petitioner respectfully shows the Court as follows:

JURISDICTION OF THE COURT

The jurisdiction of this Court to review the case on petition for a writ of certiorari rests upon 28 U.S.C. Section 2254(1), as more fully shown by the copy of the petition for writ of certiorari attached hereto (Exhibit A). Jurisdiction to issue the stay requested by this application is conferred by 28 U.S.C. Section 2101(f). Application for stay was first made to the United States Court of Appeals for the Fifth Circuit, but was denied on October 26, 1973. (See Exhibit B attached hereto). Thus, petitioner has complied with Rule 27, Supreme Court Rules.

STATEMENT OF THE CASE

Petitioner was convicted for violating Title 18, Section 2113(c), U.S.C., i.e. receiving and concealing of money stolen from a national bank. During the trial of the case, the government introduced portions of a tape recording of a conversation between a government witness and the petitioner. The taped conversation occurred between the second and third trials of the case and indicated inferences that the petitioner was involved in the bank burglary and had obstructed justice. The conversation was recorded by the government witness after government agents had attached a recording device internally to her telephone and she had led the defendant to believe she was a witness for the defense.

Petitioner's pre-trial motion to suppress alleged that the taped conversation violated his Fifth Amendment and Sixth Amendments rights.

The trial court denied the motion and the Circuit Court affirmed the conviction in a per curiam opinion pursuant to Fifth Circuit Local Rule 21. (See Exhibit C attached hereto). Petition for Rehearing was denied on the 27th day of November, 1973, and a motion to stay mandate pending the filing of a writ of certiorari was denied on October 26, 1973, (Exhibit B).

REASONS FOR GRANTING THE APPLICATION

1. The conviction, which is the subject matter of the petition for writ of certiorari, was the result of the third trial of the case. Petitioner's first conviction was reversed by the Court of Appeals (United States v. Halperin, 441 F.2d 612 (5 Cir. 1971). His second trial resulted in an undecided jury. Petitioner has currently posted a $15,000.00 surety bond and has prepaid the fine of $5,000.00 assessed by the trial court (See Exhibit D). The petitioner has always appeared before the trial court when ordered.

2. The petitioner is a self-employed man who operates several small businesses (a motel and two night clubs). Petitioner, in addition to the fine, was sentenced to serve five years in prison. Thus, if this application is not granted, he will be irreparably injured when the mandate is issued and he is confined in prison during the pendency of the petition for writ of certiorari.

3. The public interest will not be adversely affected since the petitioner has prepaid his fine, has posted an adequate bond, and is under the trial court's order not to contact any government witnesses in this case.

4. The Court of Appeals erred in holding

that the taped conversations between a government agent and the petitioner after indictment was proper, Massiah v. United States, 377 U.S. 201 (1964), as is more fully explained in the petition for writ of certiorari attached hereto.

Wherefore, petitioner respectfully requests that an order be entered staying the issuance of the mandate of the Court of Appeals until the final determination of the matter by this Court.

Respectfully submitted,

CHARLES W. TESSMER

706 Main Street, Suite 400
Dallas, Texas 75202

ATTORNEY FOR PETITIONER HALPERIN

CERTIFICATE OF SERVICE

I hereby certify that two copies of the above Motion for Stay have been served upon the Honorable Charles D. Cabaniss, Assistant United States Attorney, United States Courthouse, Sixteenth Floor, 1100 Commerce Street, Dallas, Texas, and that two copies have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same with the United States Postal Service, postage prepaid this _____ day of _____, 1973.

_____

CHARLES W. TESSMER

706 Main Street, Suite 400
Dallas, Texas 75202

ATTORNEY FOR PETITIONER HALPERIN

APPENDIX A

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO.

JACK HALPERIN,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

JACK HALPERIN,
Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, JACK HALPERIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (attached hereto as Appendix A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals

was entered October 10, 1973,
A petition for rehearing was denied on 27th of November,1973 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the introduction into evidence of the contents of a telephone conversation between the petitioner and a government agent which occurred after indictment violated the self-incrimination provision of the Fifth Amendment and the right of counsel provision of the Sixth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person...shall be compelled in any criminal case to be a witness against himself.";

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.".

STATUTORY PROVISIONS INVOLVED

Title 18, Section 2113(c), United States Code:

> "Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the

same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (B) of this section, shall be subject to the punishment provided by said subsection (B) for the taker.".

STATEMENT OF THE CASE

Prior to the first trial in this cause, Bea Weatherford (Beaty) had given a statement to the Government which was exculpatory with reference to the petitioner's involvement in a bank burglary. Mr. Halperin was convicted for receiving funds from the bank burglary in his first trial, but the conviction was reversed on an evidentiary point. United States v. Halperin, 441 F.2d 612 (5 Cir. 1971). Mr. Halperin was re-indicted and a second trial began on September 11, 1972. That trial resulted in a mistrial because the jury was unable to reach a unanimous verdict. Ms. Weatherford (Beaty) did not testify in either trial. Evidence for the Government consisted of testimony by two of the bank burglars and by two women (one, the companion of the petitioner and the other, a companion of one of the bank burglars). Evidence for the petitioner consisted of testimony by the third bank burglar and the petitioner.

After the second trial, a Special Agent of the Federal Bureau of Investigation contacted Ms. Weatherford (Beaty). After securing a statement incriminating Mr. Halperin, the agent learned that Mr. Halperin had been in contact with Ms. Weatherford. A recording device described as an ordinary cassette recorder was internally attached to her telephone, but she was not encouraged or

discouraged to make contact with the petitioner. Ms. Weatherford testified that she did not advise Mr. Halperin that she had given a different statement to the Government, but had led him to believe that she was still a defense witness.

During Mr. Halperin's cross-examination, the Government read several portions of a telephone conversation recorded by Ms. Weatherford, and a portion of the tape was played in the presence of the jury. The subject matter of the taped conversations included inferences that the petitioner was involved in the bank burglary, that he was paying people to keep him out of the case, that he was providing attorneys to keep witnesses in line, and that he was intimidating witnesses.

Although no objection was made to the taped conversations at the trial, a pre-trial motion to suppress the evidence was denied. The motion alleged that the taped conversations:

> "(A) violates his rights pursuant to the Fifth Amendment...in that the Government actively sought to use the defendant's own statements without notifying him;
>
> (B) violates his rights pursuant to the Fifth and Sixth Amendments ...in that the tapping of the defendant's attempts to locate a witness who had given a favorable statement to his defense...has a chilling effect on the defendant's right to a fair trial...;
>
> (C) violates his rights pursuant to the Fifth Amendment...and the

> concept of fundamental fairness in that the Government actively sought to have the witness Beaty contact the defendant and try to elicit incriminating statements and inferences from him similar to the form of entrapment in Sorrells v. United States, 287 U.S. 435 ... in that it appears that the Government was trying to manufacture the criminal offense of perjury, subornation of perjury, or to manufacture a method by which the defendant would incriminate himself through a Government agents.".

REASONS FOR GRANTING THE WRIT

In Massiah v. United States, 377 U.S. 201 (1964), this Court held that inculpatory statements deceptively elicited from an indicted defendant in the absence of counsel by a co-defendant-Government agent were inadmissible. The decision in Massiah was based upon the Fifth Amendment's self-incrimination provision and the Sixth Amendment's right to counsel provision.[1] Mr. Justice Stewart's opinion for the Court stated:

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[1] Massiah had alleged that his "Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of retained counsel.". 377 U.S. at 204.

> "'Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crimes'..." 377 U.S. at 204.

In effect of McLeod v. Ohio, 381 U.S. 356 (1965), was that Massiah commands an absolute right to counsel after indictment, thereby vitiating all statements, whether voluntary or not, made without counsel or valid waiver of counsel. See United States, ex rel. O'Conner v. New Jersey, 405 F. 2d 632 (3 Cir. 1969).

Massiah has been held not to apply in situations of misplaced confidence, i.e., where the incriminating statements were made to a person who was not an agent for the Government, United States, ex rel. Baldwin v. Yeager, 428 F.2d 182 (3 Cir. 1970), United States, ex rel. Milani v. Pate, 425 F.2d 6 (7 Cir. 1970); where the statements were made as part of defense strategy, Mize v. Crouse, 399 F.2d 593 (10 Cir. 1968); where the statements were used as evidence in a case filed after the conversation, United States v. Osser, ___F.2d ____, 13 Cr. L. 2476 (3 Cir. 1973); or where the record clearly reveals the error was harmless, Milton v. Wainwright, 407 U.S. 371 (1972), United States v. Hayles, 471 F.2d 788 (5 Cir. 1973).

None of the above situations apply to Mr. Halperin's case. Where the Government initiates the interview with the witness and attaches a recording device internally to her telephone, and then that witness leads the petitioner to believe that she has not

changed her previous statement given to the Government and could be a defense witness, it cannot be stated that the witness is just an interested citizen.

A similar fact situation is found in United States v. Brown, 466 F.2d 493 (10 Cir. 1972), where, after the defendant had refused to talk with the police, the police persuaded a "friend" of the defendant to secure a confession. The Court of Appeals held that the situation was not a case of misplaced confidence since the friend was functioning as an instrument of the police.

Further, there is absolutely no evidence that the statements were made as part of defense strategy. The statements were used in the case pending against the petitioner when the statements were made and were obviously harmful.[2]

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[2] The complained of evidence, when considered in context with the Government's case, infers that the petitioner was involved in the bank burglary, that he was suborning perjury and that he was obstructing justice by intimidating witnesses. Further, the Government's final argument to the jury made effective use of the evidence:

> "...We might classify this--obstruction of justice. You've seen it and I am here to tell you--I'm here to tell you that that's more serious than most any other crime, most any other thing that can happen, and there's been an abundance of it in this case. That's the effort of this Defendant to threaten witnesses,

(continued on next page)

The issue of guilt in this case has been strongly contested in three trials. One of the trials resulted in a "hung jury". Although the Government enjoyed a slight edge

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2 (Cont.)
to induce them to lie in his behalf, and to make them unavailable to appear before you. There's only one reason to obstruct justice and that's to prevent yourself from being found guilty. I don't think it's any clearer, and we heard a lot about this from a number of witnesses--I don't think it's any clearer than in the tape that you heard reference made to--the tape recording of the conversation between the Defendant and Bea Weatherford last Fall where she mentions getting her jaw broken, that too many things are happening to her and she got out of town and went to San Antonio, and the Defendant says, "Yes, you remember when you came to me for your problems, your brake linings". She associated her brake lining problems with her broken jaw, and he said, "You remember you came to me and it stopped?" She told us about it. The words she used, she said, "Halperin told me to stick with him and bad things would quit happening to me". She's done a lot of bad things that she told you about, which I'll say it took a lot of courage to tell you--a lot of courage.". (Argument pp. 12-13).

in the quantity of witnesses, the issue of guilt was not such a closed issue that the error complained of could be held harmless. An affirmative defense was presented which, absent the complained of evidence, may have resulted in a finding of innocence. The record does not clearly reveal harmless error.

Although the exact words used in Massiah were not used in the motion to suppress evidence,[3] the motion sufficiently preserved the error.[3] Further, this Court has apparently considered this issue as plain error. See Beatty v. United States, 389 U.S. 45 (1967), where a conviction was reversed even though the defendant did not raise the objection until the appeal brief was filed.[4]

The Court of Appeals has rendered a decision which is in conflict with the decisions of this Court (Massiah v. United States, supra; McLeod v. Ohio, supra; Beatty v. United States, supra. Further the Court of Appeals' decision

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[3] The failure to object to the actual introduction of the taped conversation at the trial does not waive the error preserved by the motion to suppress evidence. See Gurleski v. United States, 405 F.2d 253, 261 (5 Cir. 1968); Washington v. United States, 401 F.2d 915, 918 (D.C. Cir. 1968).

[4] See Beatty v. United States, 377 F.2d 181, 193, (5 Cir. 1967), dissenting opinion of Judge Ainsworth.

is in conflict with the decisions of other courts of appeals on the same issue (United States v. Brown, supra; United States ex rel, O'Conner v. State of New Jersey, supra).

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES W. TESSMER
706 Main Street, Suite 400
Dallas, Texas 75202

COUNSEL FOR PETITIONER

RONALD L. GORANSON
706 Main Street, Suite 400
Dallas, Texas 75202

(Of Counsel)

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on the same date as shown in the letter of transmittal accompanying this Petition.

CHARLES W. TESSMER
706 Main Street, Suite 400
Dallas, Texas 75202

COUNSEL FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1996
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK HALPERIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

(October 10, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1996

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK HALPERIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Oct. 10, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 27, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that

the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

23

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
Oct 26 '73
EDWARD W. WADSWORTH
CLERK

No. 73-1996

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK HALPERIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

O R D E R:

IT IS ORDERED that the motion of appellant filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

John R. Brown

UNITED STATES CIRCUIT JUDGE

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1996
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JACK HALPERIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(October 10, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT C

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	NO. CR-3-2556
VS.	
JACK HALPERIN	Filed Apr 30, 1973

On April 20, 1973, the defendant in the above styled and numbered cause was sentenced to a term of five years in a federal prison and a fine of five thousand dollars ($5,000.00). It was the further order of this Court that before the defendant would be released upon bond pending the appeal of the judgment of conviction, the defendant would have to pay into the Registry of the Court the sum of five thousand dollars ($5,000.00) to guarantee payment of the fine assessed pending the result of the appeal, said sum to be used to pay the fine if the Circuit Court of Appeals affirms the conviction, and said sum to be returned to the defendant if the Circuit Court of Appeals reverses the conviction.

Therefore, it is Ordered and Adjudged that the defendant, Jack Halperin, will be allowed to remain free from custody upon the $15,000 surety bond previously filed with the United States Magistrate for the Northern District of Texas, provided that the sum of five thousand dollars ($5,000.00) be paid into the Registry of the Court on or before April 30, 1973, said sum to be used to pay the fine previously assessed by this Court if the conviction is affirmed by the Circuit Court of Appeals, and said sum to be

refunded to the defendant if the conviction is reversed by the Circuit Court of Appeals.

Entered this 30 day of April, 1973.

s/Sarah T. Hughes
United States District Judge